NMA REPORT #R-370-D, Rev. 6

DATE: June 18, 2009

Edited By: Richard A. Block

124 NORTH VAN AVENUE
Houma, LA 70363-5895
Phone: (985) 851-2134
Fax: (985) 879-3911
www.nationalmariners.org

[Formerly Gulf Coast Mariners Association, Founded in 1999.]

WHISTLEBLOWER PROTECTION, WORK-HOUR ABUSE, AND "DEADHEAD" TRANSPORTATION

TABLE OF CONTENTS

Whistleblower Protection for Lower-Level Mariners 1
Your Responsibilities as a Merchant Marine Officer 2
Boardings and Inspections 2
Your Obligations to Your Employer 2
Three Examples Outline the Slippery Slope of Whistleblower Protection 2
Case #1: Feemster vs Titan 3
Case #2: Garrie vs James L. Gray, Inc. 3
Case #3: Meaige vs Hartley Marine Corp. and Midland Enterprises 3
Discouraged Mariners React to a Deck Stacked Against Them 4
Mariners Question Existing Whistleblower Protection 5
Mariners Explain Work-Hour Abuses at Crew Changes to Coast Guard 5
Our Association Reported Many Work-Hour Violations 6
The Oklahoma Bridge Catastrophe and ñDeadhead Transportationò 7
We Encourage Mariners to Report Flagrant Work-Hour Abuses 9
Limited Federal Whistleblower Protection Under Existing 46 U.S. Code §2114 10
Proposed Legislation Would Help Whistleblowing Mariners 10
Current Status of Mariner Whistleblower Protection 12
State Whistleblower Protection: in Louisiana ï the Winkler Case 13
Coast Guardôs Guide to Work-Hour Limitations 15
Work-Hour and Watchstanding Limitations 15
Responsibilities 15
Protections 15
Work-Hour Violation Aid 15

*[**Publication History:** Formerly issued as GCMA Report #R-346. Revion.1 was dated May 14, 2003. Revision .3, was dated Nov. 11, 2004. Revision 4 was **renumbered** as R-370D (series) on May 30, 2006 with text on Case #4 added on June 18, 2006 before issue. Revision #5 to Report R-370-D was issued on June 18, 2009. This paper is **Revision 6.]***

WHISTLEBLOWER PROTECTION FOR LOWER-LEVEL MARINERS

The term ñWhistleblowerò refers to a person who reports illegal activity to the authorities. By ñillegalò we mean an act that violates an existing statute (i.e., law) enacted by a legislative authority[(1)] or a regulation established by a governmental agency authorized to prepare and administer regulations.[(2)] *[(1)Congress and state legislatures are examples of legislative (i.e., law-making) authorities. (2)The Coast Guard and the state departments of environmental protection are examples of regulatory agencies that write "rules" that are used to administer laws. For a discussion of the system of federal regulations refer to NMA #R-223,* Rev.3, *Understanding and Using Federal Regulations. The Federal Register/CFR System. That report describes the Federal Register (FR) – Code of Federal Regulations(CFR) system of rulemaking in effect since 1935.]*

Employers resent most employees for ñblowing the whistleò to stop a statutory or regulatory violation. Consequently, it is often necessary to provide ñprotectionò from an employer who wants to retaliate against the whistleblower by firing him or interfering with him in the workplace to encourage him to quit his job. The government, either state or local, often provides limited protection to whistleblowers by law ï either state or federal. Understanding and invoking this protection is not always simple or easy. However, a recent decision by

the United States Court of Appeals for the Seventh Circuit provides some necessary clarification. Recent legislation ***proposed*** by Congress would change the outlook for whistleblower protection for our mariners.

YOUR RESPONSIBILITIES AS A MERCHANT MARINE OFFICER

Nobody begged you to get a Coast Guard credential. You did so voluntarily and of your own free will for reasons that you found important ï career advancement, prestige, better pay. You applied for the credential (formerly called a ñlicenseò) studied for it, and finally were examined and, if successful, issued a credential with one or more ñendorsementsò in a passport-style booklet. Before the Coast Guard finally issued the credential you were administered and **signed an oath** that reads as follows:

ñI do solemnly swear or affirm that I will faithfully and honestly, according to my best skill and judgment, and without concealment and reservation, perform all the duties required of me by the laws of the United States. I will faithfully and honestly carry out the lawful orders of my superior officers aboard a vessel.ò

This oath assumes that you know what the ñlaws of the United Statesò are as they refer to those that govern the maritime industry. Many, but not all, of the ñlawsò you will be concerned with are contained in Title 46, U.S. Code (Shipping). These laws are explained in greater detail in the regulations you will find in Title 46, Code of Federal Regulations, parts 1-199 (Shipping) and Title 33 Code of Federal Regulations, Parts 1-199 (Navigation and Navigable Waters).[1] *[[1]Refer to our Report #R-223, Rev. 3 for details.]*

Unfortunately, many mariners received their credentials with an incomplete knowledge of the basic laws and regulations that govern the maritime industry. If you think you fall within that number, before you ñblow the whistleò to stop an ñillegalò activity you should first be certain that the activity really is illegal and that it violates some law or regulation. Just because something is unsafe does not always guarantee it is illegal. Take the time to read and study the applicable regulations before you ñblow the whistle.ò

Boardings and Inspections

Offshore Supply Vessels (OSV) and Small Passenger Vessels are ñinspectedò vessels that are strictly regulated by Coast Guard regulations. Most owners of these vessels provide copies of the statutes and regulations on board their vessel to give licensed officers an on-board reference and a clear idea of the laws and rules the vessel must comply with.

Towing vessels, on the other hand, remain as ñuninspectedò vessels until Aug. 9, 2004 when Section 415 of the Coast Guard and Maritime Transportation Act of 2004 placed them on the list of 14 other classes of inspected vessels. However, until the Coast Guard promulgates the necessary inspection regulations (e.g., either interim or final regulations), towing vessels will be treated as they were ñuninspectedò vessels.

At present, the Coast Guard does NOT conduct regularly scheduled inspections of ñuninspectedò vessels in the water and out of the water following a detailed checklist backed by a very detailed set of regulations. Uninspected towing vessels only must comply with a very sketchy set of regulations that only covers essentials of lifesaving and firefighting equipment and a few other rather specific items. *[Refer to U.S. Coast Guard Requirements for Uninspected Towing Vessels, Change 1, March 2009 available from Supervisor, USCG Towing Vessel National Center of Expertise, 225 Tully St., Paducah, KY 42003-0170 and our Report #R-234, Rev.1, Towing Vessel Regulation Logbooks.]*

The Coast Guard may ñboardò inspected or uninspected vessels at any time. ñBoardingsò are done on a random basis by an armed ñboarding party.ò They are quite different from an ñinspectionò where the mariners, the boat owners, and the Coast Guard inspectors have plenty of time to prepare for in advance and the inspectors come unarmed!

Your Obligations to Your Employer

If something is ñwrongò with your boat or with the job you are assigned to do that makes it unsafe for yourself or your crew, the first person you are obligated to tell about the situation is your employer.

If you believe the job you are supposed to undertake cannot be undertaken legally or safely[1] you must ***first tell your employer*** about it in an open and frank manner. It may be to your advantage to have a witness to this conversation or to record it in the vessel logbook if the conversation occurs over the radio or telephone. However, unless you ***first*** notify your employer of the problem and ask for his help you may not be successful in obtaining ñwhistleblower protectionò if you need it later. In other words, your first obligation is to discuss your problem with your employer.[2] *[[1]A master is responsible for the safety of his vessel and its crew. [2]By "employer" we mean your immediate supervisor such as a Port Captain and not necessarily the Chief Executive Officer of a large corporation.]*

THREE EXAMPLES OUTLINE THE SLIPPERY SLOPE OF WHISTLEBLOWER PROTECTION

The key point to remember about federal whistleblower protection is that it is very limited in its scope. Most

government agencies believe they are strong enough to enforce their regulations and only need limited help from outsiders to assist it in doing so. Other agencies, like the Coast Guard, are ñspread thinò and need to encourage the active support of mariners. Unfortunately, many lower-level mariners were often discouraged from using the existing law at 46 U.S. Code §2114.

We will briefly review three cases that reached Federal District Courts and moved on to Courts of Appeal in the 1980s. The courtsô interpretation was very discouraging for mariners who saw laws and regulations violated often with no punishment meted out.

Case #1: Feemster Vs BJ – Titan

Richard P. Feemster, Sr., was a tugboat captain who worked for BJ-Titan, an oilfield service company, on the M/V JUNE J pushing barges. At about 1700 hours on February 18, 1987, his employer instructed him to push a barge from Venice, LA, to Lake Pagie, LA, a voyage estimated to take 18 hours. Feemster said that BJ-Titan required him to make this trip without stopping although his employer disputed that point.

Feemster ***refused to make the run*** on the grounds that it was too long to be safely navigated by one person and that it would violate a federal law that restricts towing vessel operation to 12-hours in a 24-hour period (46 U.S. Code §8104(h). When Feemster refused to accept the assignment, BJ-Titan management fired him.

Feemster, like most of our ñlower-levelò mariners, was employed on an ñat willò basis. This means that he was not a member of a union and had no contract covering the terms of his employment. Consequently, he could be fired for any reason or no reason at all, including even for a morally reprehensible reason. His attorney also had to concede that the existing statute (46 U.S. Code §2114) gave him no personal right to refuse a management directive he disagreed with even if it violated a safety statute. Feemster simply placed his judgment against that of his employer in saying that a safety violation would occur if he made the trip, and he refused the assignment. He was fired for his refusal. He never left on the trip and no violation of the law ever occurred.

An employee can complain of safety violations to the Coast Guard and ask for its help to prevent a violation. If Feemster had filed such a complaint (but he didnôt) and had been fired for doing so, he would have had a stronger argument that he was fired in retaliation for committing an unlawful act and might have gotten his job back.

[NMA Comment: Feemster did not enlist the aid of the Coast Guard after advising his employer of the safety violation. Since Feemster never set out on the voyage, he never violated the 12-hour statute.]

Case #2: Garrie Vs James L. Gray, Inc.

Hubert Garrie was employed by James L. Gray, Inc. as the captain of the M/V MR. BILL that carried workers and equipment to various inland oilfield work sites. Texaco leased the boat and its crew from Gray on a day-to-day basis.

On several occasions in June 1986, Garrie piloted the boat on both a ñday runò and a ñnight runò within the same 24-hour period and thus worked in excess of the 12-hours per day limit set by 46 U.S. Code §8104(h). Since he believed this was both illegal and unsafe, Garrie informed a Texaco representative he would work no more than 12-hours per day, and that if Texaco planned both day and night runs the vessel would require another captain and a full crew. However, ***Garrie did not complain about his working hours to anyone at Gray (his direct employer)*** ï only to Texaco (the boatôs charterer).

Garrie then called a Coast Guard officer and identified himself but did not identify his employer. Garrie asked whether the law regulating maximum working hours was still in effect. The Coast Guard officer advised Garrie that it was, but did NOT refer the matter to an investigator since Garrie stated he did not wish to file a formal complaint.

Garrie then informed Texaco that the Coast Guard confirmed that 12 hours was the maximum applicable working hours and that it was still his intention to refuse to work more than 12-hours per day.

Two days later Garrie was reassigned to another crewboat owned by Gray, the M/V MR. JIM, because Texaco felt that day and night runs might be necessary. Texaco complained to Garrieôs supervisors that if Garrie refused to make both runs, they should find another captain that would. Within the month after his reassignment, his new job vanished and Garrie was laid off.

[NMA Comment: Garrie violated a law (i.e., the so-called 12-Hour Rule), a fact he confirmed in speaking with the Coast Guard officer. After he was fired, Garrie filed suit in Federal District Court and later appealed to the Fifth Circuit Court of Appeals claiming wrongful discharge in that he was fired for making a report to the Coast Guard. Unfortunately, he did not report the problem to his employer and only inquired but did not formally report the matter to the Coast Guard.]

Case #3: Meaige Vs Hartley Marine Corp. And Midland Enterprises

Nicholas B. Meaige was employed by Hartley Marine Corporation from 1978 to 1988. He worked as a deckhand and pilot on vessels operating on the Ohio River, and, occasionally would be called on to serve as a pilot on what was called the ñAshland fuel run.ò This run involved a round trip between Point Pleasant, WV, and Kenova, WV, where the fuel barges in his tow were loaded at an Ashland Oil Company refinery. The ñAshland fuel runò would last as long as 30 hours, depending on the water level and how long reloading at the Ashland

refinery took.

The crew on this run consisted of only a pilot and a deckhand. The pilot was required to be available for the entire run from port to port and could not turn control of the vessel over to an unlicensed deckhand. There were no sleeping accommodations on the boat, no cooking facilities except a hotplate, and no refrigerator. Toilet facilities consisted of a garbage bag.

Meaige piloted the Ashland fuel run about 10 times. On his last run, while waiting for his barges to be reloaded, he called his supervisor and asked for a relief crew. He explained that he and his deckhand were too fatigued to safely make the return trip. His supervisor refused to supply a relief crew, and, on the return trip, the barges were involved in a minor lock wall allision at Gallipolis Locks.

In March 1988, Meaigeôs supervisor again requested that he make the Ashland fuel run. He refused and stated that he would not make any more fuel runs unless there was a relief crew available. He also complained that 24-hours was too long to stay on that boat with no shower and bathroom facilities and the boat was too noisy. He was immediately fired.

[NMA Comment: Meaige brought a "wrongful discharge" action against his employer and did not prevail. Meaige did not enlist the aid of the Coast Guard after advising his employer of the safety violation. However, Meaige repeatedly broke the 12-hour statute before he was fired.]

DISCOURAGED MARINERS REACT TO A DECK STACKED AGAINST THEM

In a letter dated March 16, 1994 Lee J. ñJeffò Bloomfield, Esq.,[(1)] who represented the American Inland Mariners Association (AIM), later Pilots Agree, and frequently represents members of the National Mariners Association made these pertinent comments to the staff of the House Merchant Marine and Fisheries Committee:

ñThere may be situations, however, where a seaman is instructed to perform a prohibited task, and is thus faced with either violating the law (after which the Coast Guard can be notified, and the protection of 46 U.S. Code §2114 is applicable), or refusing the instruction (in which case the seaman has no protection from employer retaliation). This creates the situation where a seaman must first violate the statute to avoid retaliatory discharge before he/she will be in a position to report the violation to the Coast Guard.[(2)] This obviously negates the safety benefit that the statutes were enacted to promote in the first place. Also, it places the licensed mariner in the precarious position of either losing his/her license if caught in the violation, or facing the loss of employment if he/she refuses the violative act. Allowing a maritime employer to terminate a seaman for refusing to violate a safety statute thus weakens the efficiency of the entire safety scheme established by federal statute and regulationé ò *[(1)Lee J. Bloomfield, Esq., 50 North Street, Memphis, TN, 38103. 1-800-582-6213. (2)Emphasis ours.]*

The case law clearly shows that most ñlower-levelò mariners have good reason not to report violations of safety statutes and regulations either to their employers or to the Coast Guard. In all three cases outlined above, the mariners were retaliated against, were fired, took their cases to court, lost, and had to foot the bill for their efforts. In two of the three cases, the mariners actually broke the law and could have placed their credentials in peril of suspension or revocation. Aside from the dozens of technical issues covered in these cases, the fact that mariners frequently are called upon by their employers to violate the law is extremely important and extremely dangerous.

The Coast Guard has its own Administrative Law system in place to deal with mariners who ñbreak the law.ò This system is very clearly attuned to going after the mariner rather than the ñcompany.ò[(1)] A mariner is a much easier target than a corporation because the mariner has his credentials at risk. Suspending or revoking a marinerôs credential effectively deprives him or her of the ability to make a living. In fact, protecting your credential is so important that we recommend that our mariners obtain license insurance.[(2).] *[(1)The Coast Guard tells us*: ñ*In order for us to build a legitimate case for administrative civil penalty prosecution before a Hearing Officer, we need specific factual evidence, such as witness statements, to support allegations. It would be a disservice to you and your Association to suggest that we could proceed with anything less than witness statements and a prompt report to the cognizant Coast Guard office." Quoted from letter dated Feb. 18, 2003 by Chief, Marine Safety Division, Eighth Coast Guard District. (2)Refer to our Report #R-342,* Rev.5. *License Defense Insurance; Income Protection Insurance and Civil Legal Defense. Our Association does* ***not*** *sell license insurance.]*

The Coast Guard issues this WARNING[(1)] to mariners who break the law: ñTh(e) oath does not allow a mariner to ignore the laws of the United States because of a belief that the company may ñretaliate.ò The Master has complete control of the vessel and the duty to ensure the safety of the vessel and its crew. The Coast Guard cannot absolve the Masterôs responsibility and duty to follow U.S. law because the Master ñbelievesò the companyôs policy directs them otherwise. Similarly, the company has a responsibility to abide by the laws of the United States.

ñFurther, it is a reasonable expectation for a prudent Master to immediately inform his employer of a crew change evolution or travel issue that would directly violate watch or work-hour limitations.[(2)] We agree that honest mistakes do occur; thatôs why weôve maintained that each violation case will be evaluated and processed upon its own merits. However, we are not willing to concede blanket absolution to mariners in every case when they allege that they were forced or coerced to violate the law by the company. We will investigate relevant facts, such as whether or not the mariner brought the issue to the attention of the company, prior to initiating a case against the

mariner and/or company.ò *[(1)Letter dated Feb. 18, 2003 by Chief, Eighth Coast Guard Marine Safety Division. (2)Emphasis ours.]*

MARINERS QUESTION EXISTING "WHISTLEBLOWER PROTECTION"

In a letter to the Coast Guard dated March 15, 1994, Captain John R. Sutton, past President of the American Inland Mariners Association (AIM), a voluntary association representing mariners serving on uninspected towing vessels, questioned the protection afforded licensed mariners for reporting safety violations. Sutton stated: ñWith the lack of such legislative protection, mariners risk the loss of their jobs, if they do, in fact, act in a responsible manneré ò

ñMariners should not have to be placed between doing what is right andé employers that control their careers. The mariners of this country currently do not have a protective umbrella that will shield them from (their employers) when they report such regulatory violationsé If the Coast Guard (has) a definitive position on this issue, I would like to know your thoughts.ò

F. J. Flyntz, then Acting Chief of the Coast Guard's Merchant Vessel Personnel Division responded to Captain Sutton on Nov. 4, 1994, as follows:

ñYour letter raises three areas of concern regarding the protection of "whistleblowers":

- Are "whistleblowers" protected when they report to the Coast Guard general regulatory violations?
- Are "whistleblowers" protected when they report to the Coast Guard specific mechanical failures?
- Are "whistleblowers" protected when they report to the Coast Guard a "hazardous condition" as defined by 33 CFR 160.203?

ñSeaman who report their employers, for violation of Subtitle II of Title 46, United States Code, are provided some protection against retaliatory action. Currently, Section 2114(a) of Title 46, United States Code states:

ñAn owner, charterer, managing operator, agent, master, or individual in charge of a vessel may not discharge or in any manner discriminate against a seaman because the seaman in good faith has reported or is about to report to the Coast Guard that the seaman believes that a violation of this subtitle, or a regulation issued under this subtitle, has occurred.ò

ñAdditionally, Section 3315(a) of Title 46, United States Code, states: ññEach individual licensed under part E of this subtitle shall assist in the inspection(1) or examination(2) under this part of the vessel on which the individual is serving, and shall point out defects and imperfections known to the individual in matters subject to regulations and inspections. The individual also shall make known to officials designated to enforce this part, at the earliest opportunity, any marine casualty producing serious injury to the vessel, its equipment, or individuals on the vessel.ò *[**Editorial note**: (1)Inspection refers to a formal inspection of an "inspected" vessel . (2)"Examination" refers to safety and regulatory compliance checks made during a "boarding".]*

ñTaken together, these sections provide ***some*** protection for seaman. However, the protections are limited to statutory and regulatory violations cognizable under Subtitle II of Title 46 and do not address all of the situations you raised. Indeed, besides your reference to the requirement that a master or person in charge of a vessel report a hazardous condition on board a vessel to the Captain of the Port, (33 CFR §160.215), Section 311(b)(5) of the Federal Water Pollution Control Act (33 U.S. Code §1321(b)(5) requires a person in charge of a vessel to report discharges of oil. Neither of these requirements arise under Subtitle II of Title 46.

ñYour letter does point out the existence of ***gaps in coverage***, particularly relating to reports of "hazardous conditions.nj In the Federal Register dated Aug. 3, 1994, the Coast Guard published two Interim Final Rules regarding reporting of casualties and notices of hazardous conditions. A copy of your letter has been placed in the dockets for those rulemakings. Your comments will be considered along with all other comments received on these rules.ò

[NMA Comment: We agree with the Coast Guard that there are serious" gaps" in job protection for mariners who want to do the right thing and run a safe ship that complies with statutory and regulatory requirements. Our Association's efforts seek to bridge these gaps.]

MARINERS EXPLAIN WORK-HOUR ABUSES AT CREW CHANGES TO COAST GUARD

[NMA Comments: Mariner groups beyond our Association made bona fide attempts to inform the Coast Guard about flaws in existing practices that force mariners to work outside the law. AIM's Oct. 22, 1996 letter to Admiral Card cited below is an excellent example. The dangerous practice cited in this letter continues today and played a pivotal role in the Webber Falls I-40 bridge allision that claimed 14 lives.]

Dear Admiral Card,

In a recent conversation with a colleague, we discussed certain practices in the inland towing industry that I wanted to share with you. Since I do not know the depth of your personal knowledge of industry practices, please do not be offended if you already know about this practice.

The practice I will explain deals with watchkeeping on uninspected towing vessels and how a Captain is relieved at the end of his tour of duty on a vessel. It is a widely used practice for owner/operators of towing vessels to crew their vessels on a "2 for 1" basis. This is simply a rotation such as 14 days on and 7 days off or possibly 30 days on and 15 days off.

Rotating pilothouse crews in this manner involves using only three employees dedicated to the control of the vessel, i.e, a Captain, a Relief Captain, and a Pilot. Only two are physically present on the vessel with the third on his time-off ashore. The Captain is the senior individual of the vessel and is so designated by the company. The Relief Captain performs the same duties as the Captain in his absence during time off. The Relief Captain fills the after-watch position and serves as Pilot when the Pilot is on time-off. The Pilot normally only fills the after-watch position and is usually the least experienced individual in control of the vessel.

The main problem with this widely used system is that it **clearly violates the law regulating maximum work-hour limitations for operators of uninspected towing vessels**. 46 U.S. Code §8104(h) states that an individual licensed as OUTV[(1)] may not work (even voluntarily) more than 12 hours in a consecutive 24-hour period. *[(1)OUPV = Operator of Uninspected Towing Vessel now called Master or Mate/Pilot of Towing Vessels.]*

Perhaps it is necessary to explain this system in greater depth. When the Captain and the Relief Captain are sailing on the vessel together, and the Captain gets off the vessel, the Relief Captain must change watches. This normally means that the Relief Captain must move from the after-watch to the forward-watch. Incidentally and traditionally, he moves his personal belonging to the Captain's quarters (with a bigger bed)! However, this means this individual inevitably has to work in excess of the regulatory 12-hour limit on the day of the crew change. This may happen once every 15 days. Considering that the Pilot normally only works the ñafter-watchò and the Captain works the ñforward-watchò it is only the Relief Captain that violates the law. This clearly is an accident waiting to happen.

As an example, the Captain of a towing vessel serves thirty days onboard the vessel. He is relieved by the regular Pilot of the vessel at 0630 on a given morning. Considering the Captain only worked 30 minutes of the first watch of the day it is now necessary for the Relief Captain to change watches and assume the duties as Captain of the vessel. He will work 17½ hours in this 24-hour period: 6 hours from 0001 to 0600 as the Pilot, 5½ hours from 0630 to 1200, and an additional 6 hours from 1800 to 2400 serving as the Captain of the vessel.

I was told by a company representative that this work hour violation could be alleviated in several ways if the Captain split the additional 5½ hours by "working over" before getting off the boat since he would no longer have to stand a watch, or he could stand all of the remaining 5½ hours. One of the two licensed operators of the towing vessel still would have to violate 46 U.S. Code §8104(h) in order to complete this crew change.

Given the towing industry's deeply rooted premise that this system has always existed, why should they change their ways now? In searching for answers, we need to consider the ***safety aspects of operating a towing vessel for up to 18 hours a day*** without adequate relief and still comply with 46 U.S. Code §8104(a). I think it is also fair to assume the industry as a whole has always known this system violated the intent of the regulations governing watch keeping on uninspected towing vessels.

I suggest that the industry as a whole needs to address this obvious snubbing of U.S. Code requirements, if it truly hopes to address the root causes of human error relative to fatigue as we move into the 21st century. Perhaps this topic should be reviewed by the National Steering Committee for PTP or as an issue in the "Licensing and Manning for Officers of Towing Vessels" as it relates to adequate manning issues. Very truly yours, Capt John R. Sutton, President, American Inland Mariners Association, Memphis, TN.

OUR ASSOCIATION REPORTED MANY WORK-HOUR VIOLATIONS

In June 2000, our Association published a landmark compilation of 58 mariner letters documenting the widespread violation of the safety statutes and regulations limiting licensed mariners to a workday of 12 hours. This was our ñYellow Bookò numbered as our Report #R-201 and titled Mariners Speak Out on Violations of the 12-Hour Work Day.

Our mariners and staff spent a great deal of time compiling and preparing this information not only from ñlower-levelò mariners in the inland towing industry but also from mariners working in the offshore oil industry. We distributed this report to over 300 members of the public including members of both houses of Congress, Coast Guard District and Headquarters Staff Officers, the International Maritime Organization, the International Transport Workers Federation, and the leadership of Americaôs maritime labor unions.

We asked the Coast Guard to take direct action and investigate our allegations that many licensed lower-level mariners were forced to work an illegal number of hours. This was part of a much larger unified complaint in that these work hours coupled with undermanning throughout the industry led to fatigue and to accidents.

Instead of taking direct action, the Coast Guard turned the matter over to the National Offshore Safety Advisory Committee (NOSAC), a federal advisory committee. NOSAC appointed a ñPrevention Through Peopleò (PTP) Subcommittee (a real irony as one of the PTP principles is ñHonor the Marinerò) to look into the matter. They diddled and dabbled for 1½ years and finally realized that they had no ability to investigate our allegations. Our Association formally confronted Rear Admiral Pluta in a meeting at Coast Guard Headquarters on the issue in April

2002. Admiral Pluta promised to resolve the situation but took no action.

In a letter dated Dec. 4, 2002 Captain M.W. Brown on Admiral Plutas staff wrote:

ñAs promised by RADM Pluta, members of my staff examined methods of investigating reported violations in the Gulf Coast Mariners Association's "Yellow Booknj Due to the age of the reports and lack of attribution,[1] we were unable to resolve any of the allegations. The Coast Guard is interested in pursuing violations. However, we need timely, complete, and credible information to do soé ò The evidence was placed in front of their eyes 18 months earlier. Our confidence in the Coast Guardôs willingness to confront and solve real mariner issues died with that letter!

[[1] NMA Comment: "Lack of attribution" is not a valid excuse because our Association has an obligation to protect our mariners identity as long as the industry practice of "blackballing" exists. We told the Coast Guard we would provide the name on each of 58 letters to any bona fide Coast Guard investigator.]

[NMA Comment: The revelations in our "Yellow Book" were fresh when presented to RADM Pluta in June 2000 when he was Eighth District Commander in New Orleans. Each mariner who submitted a statement was ready, willing, and able to testify as to specific conditions in the industry.]

The Coast Guard at its highest level proved conclusively that it has both the ***power and the arrogance*** to ignore completely and totally any complaint lodged by our lower-level mariners. This refusal to effectively enforce the law continues to discourage mariners from entering and remaining in the industry and highlights why Congress should remove the ñmarine safety missionò from control of the Coast Guard.

[NMA Comment: The Coast Guard effectively washed its hands of all past abuses of the 12-hour rules without undertaking a single investigation. Our Association also reported to the Department of Homeland Security Inspector General's Office that the Coast Guard's Investigative system has serious and longstanding flaws. Refer to our entire Report #R-429 (Series).]

[NMA Comment: Abusing its mariners by abusing work-hour statutes is a stain on this industry the Coast Guard refuses to acknowledge – most likely because of its cozy, longstanding relationship with corporate abusers.]

ñé We have developed this guide (i.e., the ñYellow Bookò) to assist mariners in future instances where work-hour violations are suspected. A copy of the guide is enclosed.

ñThis guide is intended to help mariners understanding work-hour and watchstanding limitations on vessels that utilize a two-watch system. A check list is also included that should help mariners record information that is essential to the Coast Guard and assist in violation case processing.

ñIf you have any further questions, please contact Commander Prescott at (202) 267-0214.ò

[NMA Comment: We disseminated the Coast Guard's "Guide" (as Appendix A in this report) to our mariners although the Coast Guard freely admits that the whistleblower "protections" offered our mariners are flawed.]

THE OKLAHOMA BRIDGE CATASTROPHE AND DEADHEAD TRANSPORTATION

The St. Louis Post Dispatch, reporting on July 3, 2002 on the I-40 bridge allision at Webbers Falls, OK (on May 28, 2002), pointed out that: ñInvestigators say the captain told them he blacked out before the accident, said spokesman Keith Holloway of the Safety Board. ***The Safety Board said the captain had roughly 10 hours of sleep in the two days before the accident***.ò

Several NMA mariners looking into the accident confirmed the story that the captain spent a significant portion of the two days preceding the accident in traveling more than 1,000 miles by car between one job assignment and another for the same company. Interestingly, our Association first petitioned the Coast Guard on Apr. 18, 2002 ï one month before the accident ï to revise its current policy letter #G-MOC 4-00, Change 1[1] that treats travel time as ñneutral timeò as follows: *[[1] Policy Letter #G-MOC #04-00, Change 1 is available as our Report #R-258, Rev. 2, Watchkeeping and Work-Hour Limitations on Towing Vessels, Offshore Supply Vessels (OSV) & Crew Boats Utilizing a Two-Watch System.]*

At the time, the Coast Guard was one of the modal administrations in the U.S. Department of Transportation. As such, some of its practices and policies occasionally came under scrutiny from the National Transportation Safety Board (NTSB). This letter was occasioned by a NTSB study titled Evaluation of U.S. Department of Transportation Efforts in the 1990s to Address Operator Fatigue, NTSB/SR-99/01. The Coast Guardôs ñpolicy letterò explains the agencyôs policy on work-hours and interprets law and regulations.

ñThe "lower-level" mariners we represent are distressed with the definition of "travel time" that appears in

paragraph 2.d of this Coast Guard policy letter as follows:

"Travel time to a vessel is considered to be neutral time as it is normally not considered to be "rest", "off-duty", or "work" time, but all relevant circumstances should be considered in evaluating whether a mariner complies with the applicable "rest" required by STCW or "off-duty" requirements specified in 46 U.S. Code §8104(a)."

ñWe note that "neutral time" is not defined in your policy letter. This leaves the mariner and his employer with the possibility of a misunderstanding as to "evaluating" whether a mariner is expected to go on watch immediately upon arriving at the vessel or to wait until he has received the required rest. Lacking a clear Coast Guard policy statement, the mariner may feel justified in delaying departure until he is rested and, as a result, be fired or forced by the threat of being fired into committing an unsafe act. This in turn could lead to a fatigue-related accident, suspension or revocation of the mariner's license, and/or lawsuits and liability depending upon the nature and extent of the damage resulting from fatigued operation.

ñOur mariners have reported many "horror stories" of being forced to drive (or being driven) for hours and then having to take over a watch immediately upon arrival at the vessel. We have reported these matters to the Coast Guard.

ñOn page 40 (Table 1-1) of the NTSB study cited above, the Federal Railroad Administration (FRA) regulations at 49 CFR §228.7(a)(4) consider "***on-duty***" time to include "Time spent in deadhead transportation en route to a duty assignment." This is a clear, unequivocal statement. It is followed by this statement: "Time spent in deadhead transportation by an employee returning from duty to his point of final release may ***not*** be counted in computing time off duty or time on duty." We note that this "deadhead transportation" takes place mostly on land both for railway employees and for their mariner counterparts.

ñWe note that this FRA passage has the status of a Federal Regulation while G-MOC #4-00, Change 1 is ***only*** a "policy letternj Consequently, under provisions of 33 CFR 1.05-20, we (i.e., our Association) hereby formally file a Petition for Rulemaking and request that the wording in the FRA regulation at 49 CFR §228.7(a)(4) be adopted by the Coast Guard for the protection and welfare of mariners. We request that you hand-carry this petition to the Executive Secretary of the Marine Safety Council (G-LRA/3406) in light of the fact that that office has failed to respond to a number of our letters.ò

[NMA Comment: We requested that our petition for rulemaking (appearing on the internet at http://www.regulations.gov in Docket #USCG-2002-13594 be considered for formal rulemaking action. A copy of our petition was mailed to the NTSB, the lead investigators of the I-40 bridge accident, one month before the accident occurred. In hindsight, the occurrence of the Webbers Falls accident was predictable considering the prevalence of work-hour abuses faced by lower-level mariners in the maritime industry! Refer to our Report #R-370-A, Rev. 2. Report to Congress: Fifth Anniversary of the Webbers Falls I-40 Fatal Bridge Accident: Unresolved Issues Revisited.]

On Aug. 29, 2004, the our Association formally asked the Coast Guard Office of Compliance (G-MOC) to revise a key policy that affects most ñlower-levelò mariners in light of the Coast Guard and NTSB investigations of this accident that claimed 14 lives. In our request, we noted problems with the G-MOC policy definition of ñTravel Timeò as ñé .neutral time as it is normally NOT considered to be ñrestò, ñoff-dutyò, or ñworkò time, but all relevant circumstances should be considered in evaluating whether a mariner complies with the applicable ñrestò required by STCW or ñoff-dutyò requirements specified in 46 U.S. Code §8104(a).ò We based our request on the publication of the Coast Guard accident investigation showing that ***their accident investigation team considered travel time to the vessel to be "on-duty" time***. We believed this reflects a ñde factoò policy change that must be reflected in a revised edition of USCG Policy Letter #G-MOC-4-00.

Our Association enclosed six pages of the Coast Guard accident report including a statement that ñMr. ■■■ (i.e., the master of the vessel) had over 8 hours of work just prior to his arrival at the vessel. The vessel got underway immediately after he got on board; and Mr. ■■■ stood the first watch after the vessel got underway. In consideration of all relevant circumstances, it appears that there was a violation of 46 U.S. Code §8104(a) by Mr. ■■■.ò

We noted that the master of the vessel was paid while driving a company vehicle to work during this eight-hour period. We asserted that the significance is fact was not lost on the Coast Guard investigators, ñé after consideration of all relevant circumstancesò were convinced that this drive to work was, in effect, ñon-dutyò time and constituted a violation of law. Additional details show in the report where the masterôs time driving from his home to the company office as well as from the company office to the jobsite counts as ñon-dutyò time rather than the ñneutral timeò your existing policy states.

According to Coast Guard investigators, ***the employer also shares responsibility for violating the law.***. ñIn consideration of all relevant circumstances, it appears that there was a violation of 46 U.S. Code §8104(a) by the owner/operator of the M/V ROBERT Y. LOVE.ò

While our Association commended the Coast Guard for finally publishing the Policy Letter in 2000 to clarify the watchkeeping and work-hour limitations on towing vessels, the ñneutral timeò reference and other items clearly need revision. We petitioned the Coast Guard to change this policy in 2002, but the Coast Guard bucked the problem of ñdeadhead timeò to the Towing Safety Advisory Committee where, because of its domination by towing vessel owners, the matter was tabled. Our Association contacted both the National Transportation Safety Board and

members of Congress on this issue and urged them to strengthen ñwhistleblower Protectionò and to protect the health and safety of our lower-level mariners from further work-hour abuses.

WE ENCOURAGE MARINERS TO REPORT FLAGRANT WORK-HOUR ABUSES

[NMA Comment: Our working mariners continue to report work-hour violations to the Coast Guard. One case first reported in August 2002 contains a work-hour abuse pattern similar to the pattern preceding the Webbers Falls bridge allision. As cited in the Eighth District letter above, our mariner placed his license at risk for even reporting the occurrence to the Coast Guard.]

For those who discount the I-40 bridge allision at Webbers Falls on May 28, 2002, GCMA Report #R-293, Towing Vessel Bridge Allisions and Related Background Issues, fills in the history and shows that ñfalling asleep at the wheelò (or ñsticksò to use western rivers terminology) is much more than an occasional isolated occurrence.

One of our licensed mariners was called upon to violate the 12-hour statute (46 USC §8104(h)) that states: ñOn a vessel to which section 8904 of this title applies (i.e., a towing vessel), an individual licensed to operate a towing vessel may not work for more than 12 hours in a consecutive 24-hour period except in an emergency.ò

Our mariner reported this incident to his employer and to GCMA soon after it happened. His employer ignored the report. Because of many similarities to the events leading up to the Webbers Falls, OK, accident with his permission we immediately notified these government officials by FAX:

- The Commanding Officer of the nearest Coast Guard Marine Safety Detachment at St. Paul, MN.
- The Chief, Coast Guard Office of Investigations and Analysis, Washington, DC.
- The Executive Secretary, USCG Marine Safety Council, Washington, DC.
- RADM Roy Casto, the Commander of the Eighth Coast Guard District, New Orleans, LA.
- The Chairman, National Transportation Safety Board, Washington, DC.

GCMA, as concerned members of the public, also mentioned the matter at the Towing Safety Advisory Committee meeting in Washington on September 13, 2002. In addition, the mariner reported the matter directly to an Investigating Officer at the USCG Marine Safety Office in Morgan City, LA, as soon as he arrived at his home on September 3, 2002. His account follows:

Dear Mr. ■■■,

I just returned from working a long hitch on towboats owned and operated by [Company & Address]. During this time ***I was required to violate several safety statutes that I reported to you in person earlier today in order to safeguard my license***. This is what happened in chronological order.

I had no choice but to violate the ñ12-hour rulesò last August as described below. I had to violate the rules because I was hired as a trip pilot and had legitimate concerns for my job security and personal safety because I was a thousand miles from home. I realize quite clearly the dangers of working long hours as well as driving in vehicles whose drivers also drive long distances without sleep. With only two licensed persons on the boat, there was nobody else on board the vessel that could legally fill in for me without violating the 12-hour rules themselves. However, the fact is that I had only 6 hours of sleep in 50 hours.

I became painfully aware of how unsafe this practice is as it was all I could do to keep from falling asleep. Others faced with similar circumstances and conditions have not been as fortunate.

On Sunday Aug. 4, 2002 at 0300 I awoke, at my home, in [Louisiana] and departed with my wife for Louis Armstrong Airport, Kenner, LA, in my car for work. At 0700, I arrived early at the airport for a flight to St. Louis via Houston (Hobby Airport). At 1130, I arrived at the airport in St. Louis and was met by Alton Limousine Service and delivered to the Economy Boat Store at Wood River, IL where I sat until 1700. At 1700, I left Wood River, IL, in a crew van owned by Rushing Transport of Paducah, KY. The van was already filled with boat crewmembers for the M/V MARY LYNN, another vessel operated by [Company]. All the seats in the van were taken and almost everyone in the van was smoking. There was no opportunity to lie down, relax, or sleep in the van for any portion of the trip. The trip was very uncomfortable.

On Sunday at 2330, I arrived at Mile 501 Upper Mississippi River (UMR), and boarded M/V GREGORY DAVID operated by [Company]. The remainder of the crew continued in the van for a distance of about 300 miles to the M/V MARY LYNN in the St. Paul, MN, area. At 2335, immediately upon arrival, I went on watch on the M/V GREGORY DAVID. However, I was not required to move the boat. The boat was backed up and I was holding the tow with the port engine was running astern, and I maintained an active watch in the pilothouse.

On Monday Aug. 5, 2002 at 0500, I was relieved and had an opportunity to lay down and slept until 1100, at which time I again assumed the watch. The vessel was on standby at Mile 501, UMR. At 1345, the M/V KEVIN MICHAEL assisted by shoving the M/V GREGORY DAVIDôs tow to mile 512, UMR. I remained on duty until 1715 when I went off watch at Mile 512, UMR.

Forty-five minutes after coming off watch, I was transferred to M/V MARY LYNN located almost 300 miles away in the St. Paul area. I left the M/V GREGORY DAVID at 1800 and was driven in a crew van and delivered to the M/V MARY LYNN. I was unable to sleep en route. On Tuesday Aug. 6, 2002 at 0030, I arrived at Lock 3,

Mile 797.5 UMR where I boarded the M/V MARY LYNN and promptly went on watch at 0100. At 0115, I pulled out of Lock 3 pushing 12 loads. However, at 0200 at Mile 796, UMR, ***I stopped the boat because I was simply too tired to go any further***. At that time I made notes in vessel logbook stating: ñNote: Pilot [name] has had 6 hours of sleep in the last 46 hours due to travel to M/V GREGORY DAVID then to M/V MARY LYNN.ò At that time, I faxed a copy of the vesselôs log page to my office and never heard a word about this entry. I backed in, stopped the boat, but remained on watch in the pilothouse until I was relieved at 0530. I stopped the boat because I was not coherent, could not think, and was punch-drunk and acting like a zombie.

The crew that I found on the M/V MARY LYNN was the same crew I rode with in the van from Wood River, IL, on Sunday. They drove straight through and arrived at 0530 Monday morning and were expected to go to work immediately. Some crewmembers had driven through from Paducah, KY, and may have driven as long as 14 hours more than I did just to reach the boat. I believe that the van driver may also have driven continuously from Paducah to the St. Paul area and question the safety of driving such a distance without a break. *[Refer to our Report #R-398, Crew Van – Death Van? on the danger of fatigued crew van drivers.]*

Coast Guard Policy Letter #G-MOC #4-00 calls time in transit ñneutral timeò without defining that term. I was forced to violate 46 U.S. Code §8104(a) because ***I was not off duty for at least 6 hours within the 12 hours immediately before the time I had to go on duty***. This happened on two occasions on two separate boats owned by the same company within two days. Under the [Coast Guard] policy letter time traveling to both job sites is considered ñneutral time.ò The policy letter never defines ñneutral time.ò I believe the policy letter is flawed in that travel time should be counted as ñon dutyò time for purposes of safely assuming the watch. ***My employer orchestrated every bit of my travel to serve his business purposes***.

I hope that this report will help to clarify what licensed and unlicensed mariners must undergo simply to hold our jobs. As I see it, the only workable alternative I can see is to have a third licensed and qualified pilot on board a towing vessel in 24-hour service.ò

[NMA Position: All vessels in 24-hour service should have a second licensed mate/pilot regardless of the length of the voyage.]

LIMITED FEDERAL WHISTLEBLOWER PROTECTION UNDER EXISTING 46 U.S.CODE §2114

On Oct. 13, 2002 GCMA asked the Coast Guard for a ***Legislative Change Proposal*** to improve whistleblower protection for mariners that would at least provide us with the same degree of protection as truck drivers. Meanwhile, on Nov. 25, 2002 Congress passed the Maritime Transportation Security Act that did amend the existing whistleblower protection statute. The amended statute is cited below and exists today:

SEC. 428. PROTECTION AGAINST DISCRIMINATION.
(a) IN GENERAL.ï Section 2114(a) of title 46, United States Code, is amended to read as follows:

"(a)(1) A person may not discharge or in any manner discriminate against a seaman becauseï

"(a)(1)(A) the seaman in good faith has reported or is about to report to the Coast Guard or other appropriate Federal agency or department that the seaman believes that a violation of a maritime safety law or regulation prescribed under that law or regulation has occurred; or

"(a)(1)(B) the seaman has refused to perform duties ordered by the seaman's employer because the seaman has a reasonable apprehension or expectation that performing such duties would result in serious injury to the seaman, other seamen, or the public.

"(a)(2) The circumstances causing a seaman's apprehension of serious injury under paragraph (a)(1)(B) must be of such a nature that a reasonable person, under similar circumstances, would conclude that there is a real danger of an injury or serious impairment of health resulting from the performance of duties as ordered by the seaman's employer.

"(a)(3) To qualify for protection against the seaman's employer under paragraph (1)(B), the employee must have sought from the employer, and been unable to obtain, correction of the unsafe condition."

(b) APPROPRIATE RELIEF.ï A seaman discharged or otherwise discriminated against in violation of this section may bring an action in an appropriate district court of the United States. In that action, the court may order any appropriate relief, including ï

(b)(1) restraining violations of this section;

(b)(2) reinstatement to the seamanôs former position with back pay;

(b)(3) an award of costs and reasonable attorneyôs fees to a prevailing plaintiff not exceeding $1,000; and

(b)(4) An award of costs and reasonable attorneyôs fees to a prevailing employer not exceeding $1,000 if the court finds that a complaint filed under this section is frivolous or has been brought in bad faith.

PROPOSED LEGISLATION WOULD HELP WHISTLEBLOWING MARINERS

Although Congress dealt with this issue in 2004, it clearly merits additional attention. In the proposed ñBillò that was passed in early June 2009 by the House Coast Transportation and Infrastructure Committee, Congress has taken a fresh at how other agencies approach the matter of whistleblower protection. The Coast Guard clearly has not done everything possible to protect our mariners. The ***proposed new approach*** would amend the existing law and attach the protection of a law that already applies to other transportation workers. These two laws are as follows:

Section 11,"Protection Against Discrimination" would amend 46 U.S. Code §2114 to read as follows:
46 U.S. Code §2114. Protection of seamen against discrimination
(a)
(1) A person may not discharge or in any manner discriminate against a seaman becauseð
(A) the seaman in good faith has reported or is about to report to the Coast Guard or other appropriate Federal agency or department that the seaman believes that a violation of a maritime safety law or regulation prescribed under that law or regulation has occurred;
(B) the seaman has refused to perform duties ordered by the seamanôs employer because the seaman has a reasonable apprehension or expectation that performing such duties would result in serious injury to the seaman, other seamen, or the public:
(C) the seaman testified in a proceeding brought to enforce a maritime safety law or regulation prescribed under that law;
(D) the seaman notified, or attempted to notify, the vessel owner or the Secretary of a work-related personal injury or work-related illness of a seaman;
(E) the seaman cooperated with a safety investigation by the Secretary or the National Transportation Safety Board;
(F) the seaman furnished information to the Secretary, the National Transportation Safety Board, or any other public official as to the facts relating to any marine casualty resulting in injury or death to an individual or damage to property occurring in connection with vessel transportation; or
(G) the seaman accurately reported hours of duty under this part.; and
(2) The circumstances causing a seamanôs apprehension of serious injury under paragraph (1)(B) must be of such a nature that a reasonable person, under similar circumstances, would conclude that there is a real danger of an injury or serious impairment of health resulting from the performance of duties as ordered by the seamanôs employer.
(3) To qualify for protection against the seamanôs employer under paragraph (1)(B), the employee must have sought from the employer, and been unable to obtain, correction of the unsafe condition.
(b) A seaman alleging discharge or discrimination in violation of subsection (a) of this section, or another person at the seamanôs request, may file a complaint with respect to such allegation in the same manner as a complaint may be filed under subsection (b) of ***section 31105 of title 49*** *[see below].* Such complaint shall be subject to the procedures, requirements, and rights described in that section, including with respect to the right to file an objection, the right of a person to file for a petition for review under subsection (c) of that section, and the requirement to bring a civil action under subsection (d) of that section.ö

EXISTING ACTIONS.—This section shall not affect the application of section 2114(b) of title 46, United States Code, as in effect before the date of enactment of this Act, to an action filed under that section before that date.

49 U.S. Code §31105. Employee protections
(a) Prohibitions.—
(1) A person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment, becauseð
(A) the employee, or another person at the employeeôs request, has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety regulation, standard, or order, or has testified or will testify in such a proceeding; or
(B) the employee refuses to operate a vehicle becauseð
(i) the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health; or
(ii) the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicleôs unsafe condition.
(2) Under paragraph (1)(B)(ii) of this subsection, an employeeôs apprehension of serious injury is reasonable only if a reasonable individual in the circumstances then confronting the employee would conclude that the unsafe condition establishes a real danger of accident, injury, or serious impairment to health. To qualify for protection, the employee must have sought from the employer, and been unable to obtain, correction of the unsafe condition.
(b) Filing Complaints and Procedures.—
(1) An employee alleging discharge, discipline, or discrimination in violation of subsection (a) of this section, or another person at the employeeôs request, may file a complaint with the Secretary of Labor not later than 180 days after the

alleged violation occurred. On receiving the complaint, the Secretary shall notify the person alleged to have committed the violation of the filing of the complaint.
(2)
(A) Not later than 60 days after receiving a complaint, the Secretary shall conduct an investigation, decide whether it is reasonable to believe the complaint has merit, and notify the complainant and the person alleged to have committed the violation of the findings. If the Secretary decides it is reasonable to believe a violation occurred, the Secretary shall include with the decision findings and a preliminary order for the relief provided under paragraph (3) of this subsection.
(B) Not later than 30 days after the notice under subparagraph (A) of this paragraph, the complainant and the person alleged to have committed the violation may file objections to the findings or preliminary order, or both, and request a hearing on the record. The filing of objections does not stay a reinstatement ordered in the preliminary order. If a hearing is not requested within the 30 days, the preliminary order is final and not subject to judicial review.
(C) A hearing shall be conducted expeditiously. Not later than 120 days after the end of the hearing, the Secretary shall issue a final order. Before the final order is issued, the proceeding may be ended by a settlement agreement made by the Secretary, the complainant, and the person alleged to have committed the violation.
(3)
(A) If the Secretary decides, on the basis of a complaint, a person violated subsection (a) of this section, the Secretary shall order the person toð
(i) take affirmative action to abate the violation;
(ii) reinstate the complainant to the former position with the same pay and terms and privileges of employment; and
(iii) pay compensatory damages, including back pay.
(B) If the Secretary issues an order under subparagraph (A) of this paragraph and the complainant requests, the Secretary may assess against the person against whom the order is issued the costs (including attorneyôs fees) reasonably incurred by the complainant in bringing the complaint. The Secretary shall determine the costs that reasonably were incurred.
(c) Judicial Review and Venue.— A person adversely affected by an order issued after a hearing under subsection (b) of this section may file a petition for review, not later than 60 days after the order is issued, in the court of appeals of the United States for the circuit in which the violation occurred or the person resided on the date of the violation. The review shall be heard and decided expeditiously. An order of the Secretary subject to review under this subsection is not subject to judicial review in a criminal or other civil proceeding.
(d) Civil Actions To Enforce.— If a person fails to comply with an order issued under subsection (b) of this section, the Secretary shall bring a civil action to enforce the order in the district court of the United States for the judicial district in which the violation occurred.

CURRENT STATUS OF WHISTLEBLOWER PROTECTION

The ***proposed*** changes (above) must make their way through Congress and be signed by the President. The proposal may change as it makes its way through the full House and Senate. Some ñBillsò never emerge. Therefore, this **warning** to our mariners::

1. You must first report potential violations of the law to your employer and allow a reasonable opportunity to make necessary changes. If you are fired for ñblowing the whistleò after your employer fails to act, the ***existing*** 46 U.S. Code §2114(b)(2) offers very limited protection. However, read it carefully!

2. If you break the law, do not expect the Coast Guard to absolve or forgive you. The Eighth District Chief of Marine Safety warned our mariners. If you break the law, you stand a good chance of losing your license. Losing your license can be as financially devastating as losing your job. Also understand that the process of ñsuspension and revocationò that you face after breaking a law is not friendly to our mariners.

3. **Greed** affects everyone ï young and old, rich and poor! Your boss may try to squeeze as much work from you as you are willing to give. However, if that exceeds 12 hours in any 24-hour period for any licensed mariner it is illegal ï both for him to demand it and for you to give it.

4. When you accept extra pay for working more than 12 hours in any 24-hour period in a licensed capacity you are breaking the law. To quote the Coast Guard:[(1)] ñThe purpose of the work-hour limitation statute is to prevent fatigue related accidents and promote the safe navigation of tugboats. Section 8104(h) states ñan individual licensed to operate a towing vessel must not **work** for more than 12 hours in a consecutive 24-hour period except in an emergency.ò In September 2000, the Coast Guard Office of Compliance (G-MOC) released policy letter 04-00 that clarified work-hour limitations. The policy letter defined ***work*** as ñany activity that is performed on behalf of a vessel, its crew, its cargo, or the vesselôs owner or operator. This includes standing watches, performing maintenance on the vessel or its appliances, unloading cargo, or performing administrative tasks, whether underway or at the dock.ò It is clear from this definition that a licensed individual cannot perform

miscellaneous tasks beyond their normal 12-hour helm duty, even if it is voluntary. Consequentlyé transfer operations of petroleum cargo would fall under the definition of work. Specific concerns about violations of the work-hour limitations statute or regulations should be reported to the appropriate Marine Safety Office for review and/or investigation.ò *[(1)Letter from Chief, 8CGD Marine Safety Division to our Association dated Nov. 7, 2002. The complete text of G-MOC Policy Letter #04-00 appears in our Report #R-258, Rev.2. Watchkeeping and Work-Hour Limitations on Towing Vessels, Offshore Supply Vessels (OSV) & Crewboats Utilizing a Two Watch System.]*

5. Unfortunately, the 12-hour rule does not apply to many unlicensed mariners. The Coast Guard claims that it does not have statutory authority to promulgate a regulation limiting work hours for unlicensed personnel ï and they apparently have no intention of asking Congress for such authority. Our Association has no such inhibition. *[Refer to our Report #R-350, Rev. 4. Mariners Seek Legislative Assistance from **Congress** on Marine Safety, Health, and Work-Related Problems. See Issue #11 – Establish a Clear Definition of "On Duty Time" for Our Mariners and Docket #USCG-2002-13594]*

[NMA Comment: The matter of unlimited work hours is a major issue facing mariners who work without the protection of a contract achieved through the collective bargaining process.]

.

6. Read the latest version of 46 U.S. Code §2114 carefully to determine how limited your ñreliefò is if your employer fires you. The recent amendments to the statute served to clarify the law and go a long way to providing meaningful ñwhistleblower protectionò. A court may order your employer to give you your job back although you may not want to work there any longer. You may be reimbursed up to $1,000 for your actual costs and attorney fees. We have serious doubts whether this is enough to hire a good lawyer. You signed an oath to obey the law, so if you violate the law, you become part of the problem and not the solution.

7. You can report violations to the Coast Guard using your name and expect them not to reveal your identity under penalty of the law(1) ***as long as you ask them not to do so***. However, be aware that certain investigations cannot proceed unless you allow them to use your name. *[(1)Refer to 46 U.S. Code §3315(b)]*

8. Work-hour abuses are one of the most important violations of the law our mariners report. Unfortunately, the Coast Guard never took positive steps to end these abuses and, instead, ignored them even though they were widespread. If Coast Guard officers can see nothing wrong with routinely overworking their own search and rescue personnel(1) as Congress discovered, it is no wonder that they cannot recognize our licensed marinersô dilemma in trying to deal with an 84-hour work week. Unfortunately, the entire culture of the Coast Guard officer corps needs to change in regard to their treatment of our lower-level mariners.(2) *[(1)Refer to our Report #R-305, Betrayed–A Call for Increased Congressional Oversight of the United States Coast Guard. (2)Refer to our Report #R-350, Rev. 4, Mariners Report to Congress.]*

STATE WHISTLEBLOWER PROTECTION IN LOUISIANA – THE WINKLER CASE

Some states have types of ñwhistleblower protectionò that may or may not apply to mariners working in their waters. One of our Associationôs members, Captain Thomas Winkler, had experience with a relatively new state law in Louisiana with consequences reported to our mariners in our Newsletter of June 2002. The state law differs markedly from the federal statute as the following article discusses.

Captain Tom Winkler. It is a fact of life for most "lower-level" mariners that the 12-hour rule will be violated routinely by many employers. This was the case with Captain Thomas H. Winkler, a tug captain with years of both inland and offshore experience.

Tom was a seaman employed as a tugboat captain aboard a vessel belonging to Coastal Towing, LLC, until Coastal laid him off on or about Mar. 30, 2000 after he refused to violate a federal statute(1) and associated Coast Guard safety regulations(2) "that limited the maximum hours (3) he and his co-employee could work aboard the vessel in a 24-hour period. *[(1)46 U.S. Code §8104(b) . (2)46 CFR §§15.705 and 15.710. (3)A federal 12-hour workday limit.]*

The straw that broke the camel's back for Tom occurred during the night and morning of March 29/30, 2000 after already working more than 20 hours. Specifically, he refused an order from Coastal's customer to push a barge back to the rig in Lake Hermitage, La. His refusal to carry out these instructions was based on safety considerations. He was able to document that he was not sufficiently rested to get underway. Nevertheless, after he refused, and every two hours thereafter, he was awakened, harassed and told to get underway. Finally, after the rig threatened his employer with pulling the boat off the job, Tom was relieved of his duties and told to take a month off. This was unacceptable.

USCG Morgan City MSO Did Nothing. Tom tried his best to do his job, to satisfy his boss, and to work safely

as reflected in a detailed statement of the incident. Now, after losing his job for refusing to work beyond the legal limit, and after reporting the problem to the Coast Guard Marine Safety Office in Morgan City to no avail, he sought redress of his grievance in a letter to Congressman Billy Tauzin. This letter was plain, well-written and to the point.

Congressman Contacts 8th District Coast Guard. On Apr. 20, 2000, Representative Tauzin wrote to the Eighth District Commander, Rear Admiral Paul Pluta, asking about violations of the 12-hour rule and how often they occurred. It is both reasonable and necessary to gather factual information to give an intelligent answer to as detailed and specific a letter as Tom wrote.

Adm. Pluta Responds. On May 11, 2000, Admiral Pluta wrote to Congressman Tauzin in part: "Recently, my staff conducted an informal phone survey of a cross section of Eighth Coast Guard District Marine Safety Offices to get a feel for the volume of 12-hour rule complaints we receive. This survey indicated that (we) have received very few complaints involving mariners being forced to work more than 12 hours. However, when we receive such a complaint, it is aggressively investigated and appropriate action taken.. "After reading these words, Captain Tom Winkler felt the frustration many mariners feel when dealing with a system that appears to be stacked against them.

State "Whistleblower" Lawsuit Filed. At this point, in an independent action, Captain Winkler contacted attorneys[1] and filed suit against his employer in the 17th Judicial District (Lafourche Parish), Louisiana under a recently-enacted Louisiana whistleblower protection law since there is, as yet, no effective federal whistleblower law that protects working mariners. *[[1]Attorneys Robert E. McKnight, Jr., Murphy & McKnight, LLC, 400 Lafayette St, #150, New Orleans, LA 70130 and Russell B. Ramsey, L'Hoste & Ramsey, same address.]*

In Lafourche Parish, where some employers are in the habit of treating mariners as "boat trash" and where a yellow line of antiunion signs defaces communities along Bayou Lafourche for 70 miles for several years, Tom's lawsuit appeared dead on arrival and, in fact, was subsequently dismissed. When Tom threatened to "appeal" his case, even his friends were openly skeptical that he could find justice anywhere in Louisiana. For months, Tom's protests were little more than a babble of forlorn hope. Nevertheless, Tom's attorneys (as well as GCMA Directors) believed the case had merit and devoted considerable time, energy and talents to perfect their appeal.

Months and months of legal delays took their toll on Tom's health. Simply watching his health deteriorate as he moved from job to job was heartbreaking. The psychological toll was significant as his normally ebullient spirits slipped into depression.

The Winkler Appeal. On Apr. 31, 2001, Tom's attorneys filed a reply brief on his behalf appealing the judgment rendered by the 17th Judicial District Court. In the appeal court, the facts of the case would no longer be an issue. It would be a matter of which law would apply to the case ï state law or federal law. The law in question was the state whistleblower statute cited below:

Louisiana Revised Statute 23:967 provides:

A. An employer shall not take reprisal against an employee who in good faith, and after advising the employer of the violation of law:

(1) Discloses or threatens to disclose a workplace act or practice that is in violation of state law.

(2) Provides information to or testifies before any public body conducting an investigation, hearing, or inquiry into any violation of law.

(3) Objects to or refuses to participate in an employment act or practice that is in violation of law.

B. An employee may commence a civil action in a district court where the violation occurred against any employer who engages in a practice prohibited by Subsection A of this Section. If the court finds the provisions of Subsection A of this Section have been violated, the plaintiff may recover from the employer damages, reasonable attorney fees, and court costs.

C. For the purposes of this Section, the following terms shall have the definitions ascribed below:

(1) "Reprisal" includes firing, layoff, loss of benefits, or any discriminatory action the court finds was taken as a result of an action by the employee that is protected under Subsection A of this Section; however, nothing in this Section shall prohibit an employer from enforcing an established employment policy, procedure, or practice or exempt an employee from compliance with such.

(2) "Damages" include compensatory damages, back pay, benefits, reinstatement, reasonable attorney fees, and court costs resulting from reprisal.

D. If suit or complaint is brought in bad faith or if it should be determined by a court that the employer's act or practice was not in violation of the law, the employer may be entitled to reasonable attorney fees and court costs from the employee.

The question was whether federal law or state law governed in this case. Unfortunately, federal statutes and their interpretations by the federal judiciary did not offer either realistic or suitable protections. However, the state whistleblower statute did offer such protections.

Judgment in *Thomas H. Winkler vs. Coastal Towing, LLC and TLC Marine Services, Inc.* was rendered on Apr. 11, 2002 by Judges Gonzales, Kuhn, and Ciaccio in a 12-page decision whose conclusion is stated below:

"In conclusion, we find that federal maritime law does not preempt La. R.S. 23:967 in a case involving a Louisiana plaintiff, a Louisiana defendant, and facts that occurred solely in Louisiana. The application of La. R.S. 23:967 will not conflict with either specific federal maritime law or with the characteristic features of maritime law,

nor would the application of La. R.S. 23:967 in this purely interstate dispute interfere with the uniformity of federal maritime law in its interstate or international relations.

"Therefore, for the foregoing reasons, the trial court judgment which granted the exception of no cause of action is REVERSED, and the case is REMANDED for further proceedings. Costs of this appeal are assessed against Coastal Towing."

Winkler is Vindicated. Whether the case closes with a settlement or with further court proceedings, Tom's case proved beyond a doubt that Louisiana law protects Louisiana mariners working on Louisiana waters on boats owned by Louisiana companies. It is our hope that the "plantation mentality" that allows boat owners to drive employees until they drop in violation of the law will be dead and buried when the word gets out!

COAST GUARD'S GUIDE TO WORK-HOUR LIMITATIONS

The purpose of this guide[(1)] is to assist the mariner in understanding the work-hour/watchstanding limitations on towing vessels, offshore supply vessels, and crewboats utilizing a two-watch system. This guide also explains the responsibilities of mariners, vessel owners, operators, and masters concerning the reporting of work-hour violations. *[(1)Prepared by Coast Guard Headquarters.]*

Work-Hour and Watchstanding Limitations:

a. The law that addresses working hours for different categories of vessels is 46 U.S. Code. §8104. This law includes requirements for licensed officers to have an off-duty period before taking charge of the deck watch prior to departing port, watch rotations on vessels, and specific work-hour provisions for various types of vessels.
b. The minimum period of rest required may not be devoted to standing watch or other duties.
c. Watchstanders remain subject to the work-hour limits and exceptions.

Responsibilities:

a. Mariners are responsible for reporting real and suspected work-hour violations to the Coast Guard. If management exerts pressure to exceed the law, the mariner is encouraged to report this situation to the local Coast Guard OCMI. The Coast Guard is required by law to maintain the confidentiality of mariners that make reports.
b. When the Coast Guard determines that a casualty occurred because of a violation of law, a suspension and revocation proceeding, and/or a civil penalty may be recommended for the master. If it is determined that the crew was acting under orders of a company representative, civil penalty action against the company is likely. However, as described below, Federal protections do exist to protect the mariner against reprisal for reporting deficiencies, illegal operations, and work-hour/watchstanding violations.

Protections:

a. The Coast Guard depends on mariners to report violations or unsafe vessel conditions when they occur. To prevent retaliation for reporting violations to the Coast Guard, Congress enacted specific protections for mariners that make reports of violations to the Coast Guard. The following cites represent the obligation and protections afforded to mariners for reporting violations of the law or regulations to the Coast Guard.
   (1) 46 U.S. Code §2114 provides protection to seamen against any form of discrimination, including discharge, for reporting a violation of any law or regulation issued under the authority of Title 46.
   (2) 46 U.S. Code §3315(a) requires licensed officers to assist the Coast Guard in the inspection of their vessels as well as point out defects and imperfections known to them. This includes any violations of work or watch standing limitations.
   (3) 46 U.S. Code §3315(b) prohibits any official of the Coast Guard from disclosing the identity of any individual that provides information on vessel defects, imperfections, and overall safety. This includes information on watch standing and work-hour violations.
b. The checklist below is intended to aid a mariner in reporting work-hour violations to the Coast Guard. Completing the checklist in full will aid the Coast Guard in prosecuting a violation investigation. The more information reported increases the likelihood of success.

Work-Hour Violation Aid

- What type of vessel do you serve on?_____
- What is your crew position (i.e. master, engineer, deckhand, etc.)_____
- What is your watch rotation (circle one) Two-watch. Three-watch.
- Time and date shift started: _____
- Number of hours scheduled for shift:_____
- Hours actually worked on shift: _____

To file a work-hour violation report the following information necessary for a U.S. Coast Guard Investigating

Officer to conduct a proper investigation that will have a successful outcome:

- Were you directed by a company representative to work more hours that you were scheduled for?
- What is the company representativeôs name?
- How many additional hours were worked not on your normal watch/shift?
  - Time started _____ Time ended _____
  - What specific tasks were you assigned?
- To the best of your knowledge, are other mariners working for your company experiencing similar working conditions?
- Please provide their names (all names will be held in strict confidence in accordance with 46 USC 3315):
- Below please provide any additional comments that you feel are necessary to your report of a work-hour violation: